STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. This consolidated unfair labor practice (ULP) and objections hearing was held over several days in July and September 2021. The ULP phase of the hearing considered whether United Scrap Metal PA, LLC (United Scrap) violated §8(a)(1), (3) and (5) of the National Labor Relations Act (the Act) by, inter alia, threatening and interrogating employees, soliciting their grievances and unilaterally reducing their hours and days of work. The objections part of the hearing considered whether the Laborers’ International Union of North America, Local 57’s (the Union’s) election victory was tainted by various unlawful acts and should be overturned. As will be discussed, the ULP allegations have merit, while the objections do not. On the record, I make the following

FINDINGS OF FACT¹

I. JURISDICTION

United Scrap recycles metals and non-metals. Annually, it sells and ships goods exceeding $50,000 from its Philadelphia, Pennsylvania plant (the plant) directly to points

¹ Unless otherwise stated, factual findings arise from joint exhibits, stipulations and undisputed evidence. The cover page of the September 23, 2021 transcript (i.e., tr. 750–886) was mislabeled (i.e., it reads July 23, 2021) and is hereby corrected.
outside of Pennsylvania. It, thus, engages in commerce under §2(2), (6) and (7) of the Act. Additionally, the Union is a §2(5) labor organization. The Board, thus, has jurisdiction over this matter.

II. UNFAIR LABOR PRACTICES

A. Record Evidence

1. Introduction

On October 15, 2020, the Union filed an RC-petition with Region 4 of the National Labor Relations Board (the Board) seeking to represent the following appropriate bargaining unit of United Scrap employees employed at the plant (the Unit):

**Included:** All full time and regular part time unskilled laborers, press operators, shear operators, welders, burners and hoist operators.

**Excluded:** All other employees, supervisors and guards as defined by the Act.

(GC Exh. 1(a)). A Stipulated Election Agreement then set an election for November 20.

2. October 16 – Union T-shirt Distribution and Threats

At around 6 a.m., as part of the organizing campaign, Union Business Agent Confessor Plaza and other Union officials distributed Union t-shirts and other materials on the road outside of the plant to arriving employees. See also (GC Exh. 2). About 12 workers stopped and accepted materials. Later that morning, General Manager Darin Haas approached former employee Carlos Galvez and made this statement about the Union's campaign:

[T]here were two people outside today …. Giving you t-shirts …. [We] do not accept anything from that organization …. [We] do not accept t-shirts either …. Cards[,] …. Letters[,] …. Notes [,] …. Nothing …. [We] do not recognize or know about them …. [We] don’t … acknowledge them ….

(GC Exh. 3)(transcript). Haas acknowledged these comments. (Tr. 599–600).

3. October 16 – Union T-shirt Confiscation

Later that day, former employee Roberto Duarte Acosta observed Haas throw several Union t-shirts into a dumpster at the plant. Former employee Pablo Granados testified that, although he left his Union t-shirt in his unlocked car during the workday, it was gone when he returned. Former employee Orlin Rivera testified that he also left a Union t-shirt in his car,

---

2 All dates that follow are in 2020, unless otherwise stated.
3 Galvez recorded their exchange on his cellphone.
4 This testimony was corroborated by Haas, who acknowledged that he discarded the shirts.
was then told by Haas during the workday to throw it away, and that when he returned to his
car to discard it, it was also gone. Regarding the Union t-shirts, Haas conceded that, he
“decided … to confiscate them and throw them away.” (Tr. 599).

4. October 19 – Promises of Benefits

Employee Dagoberto Acosta met with labor relations consultant Michael Rosado. In
his affidavit, which was admitted as past recollection recorded, Acosta recalled that Rosado:

[A]sked us if we were with the Union …. [and] said that we could talk to the
Company before the Union came so that the Union would not interfere ….

(GC Exh. 7).

5. October 26 – Interrogation

In his affidavit, Acosta also memorialized this exchange with Rosado:

[He] called me … [to] the same office …. [and] was the only other person
present …. [and] asked me how we were all going to vote ….  

(GC Exh. 7).

6. November 2 – Anti-Union Petition, Soliciting Grievances and Interrogation

Former employee Osman Rivera and several employees met with Rosado in the office
area, where Rosado told them that, “we could reach an agreement with the Company without
including the Union.” (Tr. 327). He also recalled him saying that:

[T]he Company could give us a raise to leave the Union on the side. And
… we could collect signatures …. [that] could be sent to a city or a judge
… [and] be used to stop the Union from entering the Company.

(Tr. 329–330).

Former employee Osman Rivera met privately with Rosado, who told him that
employees had not reached an agreement with the company and should not believe what the
Union was offering. When Rivera said that he “knew what a union was … [and] had been
in a union before,” Rosado asked him to “name … the union.” (Tr. 335).

5 United Scrap admitted that Rosado was a §2(13) agent.
6 Rosado was, without explanation, not called to refute any of his comments, which were unrebutted and credited.
7. November 3 – Discriminatorily Permitting Nonunion Activities at the Plant

Former employees Pablo Granados, Orlin Rivera and Osman Rivera testified that, at 3 pm, the entire Unit (i.e., about 27 employees) left their workstations without management’s express authorization to attend a meeting, where employee Luis Sardinas promised raises if they voted against the Union and asked them to sign an anti-Union petition. Although management (i.e., Chief Operating Officer James Sause and General Manager Haas) never attended the meeting, Granados argued that their absences had to be plainly obvious because the noisy plant was silent for 30 minutes. United Scrap never investigated why production stopped, attempted to disband the meeting, or disciplined anyone for stopping work. Former employee Osman Rivera credibly insisted that management never left the plant unsupervised. (Tr. 349). Sause and Haas denied knowledge, which requires a credibility resolution.

For several reasons, I find that Sause and Haas knew about the anti-Union meeting, took no action to stop it and refrained from disciplining workers for leaving their jobs. First, if management was truly unaware of the meeting, it is likely that they would have investigated once production stopped. It’s improbable that both managers left the plant unsupervised at exactly the same time or somehow failed to notice a 30-minute standstill. Second, beyond generalized denials, neither Sause nor Haas substantiated where they were. It is probable that, if both were absent, at least one would have offered a substantiated excuse. Third, it is unlikely that both managers would have abandoned the plant in the middle of a Union campaign (i.e., if anything, they would have been more vigilant at such a time). Fourth, it is improbable that Rosado, who was aware of the meeting and memorialized it in his notes, never informed Sause about the anti-Union meeting; on the contrary, it is probable that Rosado would have highlighted such a meeting as a successful development in United Scrap’s efforts to counter the Union campaign. Fifth, even if the meeting somehow went unnoticed, it is probable that a 30-minute production lapse would have been later detected, once production was reviewed. United Scrap’s ongoing failure to investigate the root cause of a major production lapse suggests tacit acceptance. Finally, the purpose of this meeting (i.e., to encourage the distribution of an anti-Union petition) mirrored Rosado’s identical efforts from just a day before. This consistency suggests a coordinated plan, and further undercuts any claims of ignorance.

8. November 20 – Election Results and Change of Work Hours and Days

a. General Counsel’s Position

After the Union won the election by a 17 to 10 vote, Haas abruptly sent the Unit home and reduced their hours of work in the following way:

---

7 Rosado’s notes from November 3 stated that, “Luis requested that the employees … meet with no supervisors around,” and “Luis and Erik want to hold a meeting with no supervisors … we hope a withdrawal petition may result.” (GC Exh. 10(c)).
United Scrap did not notify the Union or bargain before enacting the Unit’s schedule changes.⁸

**b. United Scrap’s Stance**

Sause stated that the schedule change was prompted by decreased sales, which dropped from 2019 to 2020, while staffing remained constant.⁹ (GC Exh. 14). He averred that work hours were cut in lieu of layoffs and insisted that the election was not a factor. He added that the *City of Philadelphia’s Emergency Ordinance* also prompted the schedule change, although he did not explain its specific role. (R. Exh. 2).¹⁰ To date, the lost hours have not been restored.

**B. Analysis¹²**

1. **§8(a)(1) – Instruction to Not Accept Union Authorization Cards and Materials¹³**

   United Scrap violated §8(a)(1), when Haas told employees to not accept Union authorization cards, t-shirts or other materials on October 16. (GC Exh. 3). See, e.g., *Chipotle Services*, 363 NLRB 336 (2015); *Evolution Mechanical Services*, 360 NLRB 164 (2014); *Hunter Outdoor Products*, 176 NLRB 449 (1969) (telling employees not to accept union pamphlets).

2. **§8(a)(1) – Confiscating Union T–Shirts¹⁴**


---

⁸ This was roughly 57 hours per week with overtime. Former employees Granados, Orlin Rivera and Osman Rivera credibly testified that they worked this schedule for several years before the election. See also (R. Exh. 3).

⁹ Orlín Rivera said that Haas said that, “they would cut hours because the majority voted for the Union.” (Tr. 285).

¹⁰ He related that business declined in early 2020 because the manufacturing and construction industries that generated scrap materials slowed down during the pandemic.

¹¹ There is nothing in the Ordinance, which expressly required a reduction in the Unit’s hours of work.

¹² At the hearing, the GC withdraw complaint ¶8, renumbered the resulting complaint, and amended the newly renumbered ¶8(a) to add that the conduct alleged therein was inherently destructive of employees’ §7 rights.

¹³ This allegation is pled under complaint ¶¶6(a) and 9.

¹⁴ This allegation is pled under complaint ¶¶6(b) and 9.
3. §8(a)(1) – Allowing Employees to Engage in the Antiunion Meeting at the Plant

United Scrap violated §8(a)(1), when it allowed employees to hold an anti-Union meeting at the plant on November 3 during working time, while broadly barring pro-Union activities (e.g., telling them to not accept cards or t-shirts, and discarding their Union t-shirts). See, e.g., *Kenmore Mercy Hospital*, 319 NLRB 345 (1995); *Gencorp*, 294 NLRB 717, 732 (1989).

4. §8(a)(1) – Soliciting Grievances

United Scrap violated §8(a)(1), when Rosado told Acosta on October 19 that employees “could talk to the Company before the Union came so that the Union would not interfere.” (GC Exh. 7). *CPL (Linwood) LLC*, 367 NLRB No. 14, slip op. at 1 (2018) (unlawful to tell workers that their grievances will be resolved, if they refrain from unionizing).

5. §8(a)(1) – Interrogation

United Scrap violated §8(a)(1), when Rosado asked Acosta on October 26 how he was voting. (GC Exh. 7). In *Westwood Healthcare Center*, 330 NLRB 935 (2000), the Board held that these factors determine whether an exchange constitutes an unlawful interrogation:

1. The background, i.e., is there a history of employer hostility and discrimination?
2. The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?
3. The identity of the questioner, i.e., how high was he in the company hierarchy?
4. Place and method of interrogation, e.g., was employee called from work to the boss’s office? Was there an atmosphere of unnatural formality?
5. Truthfulness of the reply.

Id. at 939. In applying these factors, however, the Board concluded that:

In the final analysis, our task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act.

---

15 This allegation is pled under complaint ¶¶6(c) and 9.
16 This allegation is pled under complaint ¶¶7(a) and 9.
17 Although an employer with a past practice of soliciting grievances may continue to do so during an organizing drive, there is no evidence that United Scrap had such a practice. *Wal-Mart, Inc.*, 339 NLRB 1187 (2003).
18 This allegation is pled under complaint ¶¶7(b) and 9.
Id. at page 940.

The October 26 exchange was an unlawful interrogation. These factors are determinative: the questioning involved a protected activity (i.e., Acosta’s vote); there is extensive evidence of animus (e.g., interrogation, soliciting grievances, discarding Union t-shirts, anti-Union petition, etc.); Rosado reported to management and led meetings with them; and the questioning occurred in an office area, which involved Acosta being summoned from his workstation.

6. §8(a)(1) – Soliciting Grievances, Antiunion Petition and Interrogation

United Scrap violated §8(a)(1) on November 2, when Rosado told employees that, “[they] could reach an agreement with the Company without including the Union,” and “the Company could [grant] … a raise to leave the Union on the side.” (Tr. 327, 329–330). See, e.g., Central Washington Hospital, 279 NLRB 60, 64 (1986) (soliciting employees to sign anti-Union petition is unlawful); Placke Toyota, Inc., 215 NLRB 395 (1974).

United Scrap also violated §8(a)(1) on November 2, when Rosado told employees that, “[they] could collect signatures …. [that] could be sent to a city or a judge … [and] be used to stop the Union from entering the Company.” (Tr. 327, 329–330). See, e.g., Central Washington Hospital, 279 NLRB 60, 64 (1986) (soliciting employees to sign anti-Union petition is unlawful); Placke Toyota, Inc., 215 NLRB 395 (1974).

United Scrap further violated §8(a)(1) on November 2, when Rosado interrogated Rivera during a one-on-one meeting in the office area about the name of the union that he previously joined. (Tr. 335). Westwood Healthcare Center, supra.

7. §8(a)(5) – Unilateral Change of Work Hours and Days

United Scrap violated §8(a)(5), when it changed the Unit’s work hours and days on November 20 without notice or bargaining. Under §§8(a)(5) and 8(d), the duty to bargain collectively requires an employer “to meet … and confer in good faith with respect to wages, hours, and other terms and conditions of employment.” NLRA v. Katz, 369 U.S. 736, 742–743 (1962). In order to trigger a bargaining duty, a change must be material, substantial and significant. Crittenton Hospital, 342 NLRB 686 (2004). The GC can establish a prima facie unilateral change violation, if it shows that an employer made a material and substantial change in a term of employment without negotiating. The burden then shifts to the employer to show that the change was permissible (e.g., consistent with established past practice). Fresno Bee, 339 NLRB 1214 (2003). Once a Union has won an election, an employer must generally refrain from making unilateral changes in wages, hours and working conditions, absent notice and bargaining with the Union. Northwest Graphics, 342 NLRB 1288, 1297 (2004); Mike O’Connor Chevrolet, 209 NLRB 701 (1974). There are, however, two limited exceptions to this general prohibition: (1) where a union has delayed bargaining; and (2) where economic exigencies require prompt action. RBE Enterprises of S.D., Inc., 320 NLRB

19 This allegation is pled under complaint ¶¶7(c) and 9.
20 This allegation is pled under complaint ¶¶8 and 11.
80, 81–82 (1995). Economic exigencies do not include the loss of accounts or contracts, operating at a competitive disadvantage or supply shortages; an economic exigency is limited to an unforeseen event, which has a major economic effect that requires “immediate action.” Id.

In the instant case, the GC established that United Scrap made a material and substantial change in the Unit’s terms and conditions of employment without negotiating, when it changed their work schedule after the election. Mi Pueblo Foods, 360 NLRB 1097 (2014); 88 Transit Lines, 300 NLRB 177, 184 (1990). United Scrap has failed to show that its unilateral change was a permissible past practice, i.e., on the contrary, the record reflects that Unit employees consistently performed a Monday to Saturday schedule with extensive overtime hours. Furthermore, in spite of United Scrap’s contentions to the contrary, the City of Philadelphia’s Emergency Ordinance concerning COVID-19 was not an economic exigency, which required “immediate action” and relieved its bargaining duty. The Ordinance, as noted, did not limit its hours of operation or otherwise require a schedule change. Finally, United Scrap’s contention that the over-staffing situation prompted by the pandemic was an economic exigency requiring immediate actions is also without merit. To the contrary, it successfully operated with this over-staffing model for several months before making the unilateral change and, although the status quo might have been economically undesirable and caused it to operate at a “competitive disadvantage,” there is nothing in the record to suggest that it had to take “immediate action” regarding Unit scheduling or risk the very existence of its enterprise. Simply put, it had the time and resources to bargain over this scheduling issue, and just chose not to do so. This scenario did not, as a result, excuse its bargaining obligation. RBE Enterprises of S.D., Inc., supra. 21

III. OBJECTIONS

United Scrap filed 3 objections22 to the Union’s conduct during the critical period before the election (i.e., October 15 to November 20),23 (GC Exh. 1(h)). These objections lack merit.24

A. Objection 1

This objection provides, in relevant part, that:

---

21 It is unnecessary to also pass on whether the schedule change violates §8(a)(3), inasmuch as such a finding would not materially affect the remedy. See El Paso Electric Co., 350 NLRB 151 (2007).
22 United Scrap initially filed seven objections, but, then withdrew objections 3 to 6, which left 1, 2 and 7.
23 Ideal Electric Mfg. Co., 134 NLRB 1275 (1961) (critical period is span between petition and election dates).
[The Union] … coerced eligible voters … [when] … Acosta … demand[ed] employees [to] take a picture of their ballots after they marked them … so that he could see who they voted for ….

Unit employee Jaime Rivas testified that, a few days before the election, Acosta asked employees to take photos of their ballots with their mobile phones, in order to permit the Union to see their votes. He said that Acosta said this to a coworker, Francisco Vidal, who relayed the comment to him, but, confirmed that Acosta never said it directly to him. (Tr. 816). He recalled this exchange with Vidal:

[H]e told me … that Osman [Acosta] … told him to shoot a photograph … [of] the ballot so they would know who vote[d], … for who.

(Tr. 820). Vidal was not called to testify. Acosta denied the comment.

Inasmuch as Rivas testified that Acosta told employees to photograph their ballots, and Acosta denied the comment, I must make a credibility determination. Although Rivas seemed to be a straightforward witness, his testimony was double hearsay (i.e., Acosta to Vidal to Rivas), which does not meet any recognized hearsay exceptions and cannot be afforded weight. Auto Workers Local 651 (General Motors), 331 NLRB 479, 481 (2000) (double hearsay is inadmissible, unless both parts satisfy the Board’s requirements); Kamtech, Inc., 333 NLRB 242, fn. 4 (2001). On this basis, Acosta’s denial has been credited. Objection 1 is, thus, overruled.

B. Objection 2

This objection provides, in relevant part, as follows:

Acosta made threats of violence … against another eligible voter after the individual stated his support of the Company. Acosta made this statement in front of at least 5-6 other eligible voters while blocking … [them] into a small space ….

1. Factual Findings

a. Acosta’s November 19 Statements

Former employee Luis Salinas testified that employees attended a meeting, which was led by President Serlin. (Tr. 775). He recalled Acosta complaining about employees being fired without reason. (Tr. 765). He said that, after the meeting, Former employee Erik Larios told Acosta that United Scrap treated people fairly and asked him why he was always threatening people. Acosta reacted by threatening Larios. (Id.).

25 United Scrap did not explain its failure to call Vidal to testify.

26 As discussed below, Acosta is not a Union agent.

27 Although Salinas testified that half of the Unit attended the meeting, he was ambiguous regarding how many
Larios recalled Acosta stating that United Scrap was “mistreating” workers and “people were punished without reason.” (Tr. 789). He said that Serlin stated that he would investigate. (Tr. 803). Larios averred that, after the meeting, he asked Acosta, “why he was lying?,” which prompted Acosta to threaten him. (Tr. 790).

Acosta denied threatening Larios. He claimed that Larios was the aggressor, who grabbed his shirt and threatened him. (Tr. 903).

I credit Salinas and Larios and find that Acosta threatened Larios after the meeting ended. They were generally consistent witnesses, who believably corroborated each other’s accounts. There is scant evidence, however, regarding how many employees were in the vicinity of this exchange and whether anyone, beyond Salinas, heard what was said.

b. Acosta’s Agency Status

Larios said that Acosta told coworkers that he was the “jefe” of the Union. (Tr. 797). He claimed that he said that he would become the Union representative after the election. (Tr. 791).

Union Business Agent Plaza denied that Acosta was authorized to speak for the Union. He said that Acosta never: worked for the Union; received payment; collected authorization cards; held a steward or other position; or led meetings. He agreed, however, that Acosta was 1 of 5 employees, who the Union periodically spoke with about its campaign, and that he likely invited coworkers to upcoming meetings. Acosta attended 1 or 2 of the Union’s organizing meetings, which were led by Business Agents. Plaza denied knowing that Acosta was allegedly going around telling employees that he was the “jefe,” or a future representative.

Acosta denied saying that he was the “jefe” or future representative. (Tr. 906). He agreed that he was the Union’s election observer. Although there is a credibility dispute between Larios and Acosta regarding whether he told employees that he was the Union’s “jefe” or representative, it is unnecessary to resolve this dispute. As will be discussed, even assuming arguendo that he made these comments, they were insufficient to confer agency status.

2. Analysis

a. Agency

Acosta was not a Union agent. His conduct is not attributable to the Union, without proof that it was authorized by, participated in, condoned by, ratified by, or adopted by Union workers witnessed the exchange between Acosta and Larios.

officials. *Aladdin Hotel Corp.*, 229 NLRB 499 (1977). The mere fact that Acosta served as an election observer, attended some Union meetings, and invited coworkers to meetings is insufficient confer agency status, in the absence of proof that the Union knew and ratified him allegedly holding himself as the Union “jefe” or representative. See, e.g., *Advance Products Corp.*, 304 NLRB 436, 436 (1991) (employee who was member of in-house organizing committee, solicited support for union, distributed union literature, buttons, hats, and shirts, kept union informed of events occurring in plant, and served as the union’s election observer was not a union agent); *United Builders Supply Co.*, 287 NLRB 1364, 1365 (1988) (employee who solicited and obtained signatures on authorization cards, scheduled union meetings and informed employees and served as an election observer was not an agent); *Aladdin Hotel Corp.*, supra (mere fact that an employee was prominent in the organizing campaign is insufficient to establish agency); *Mike Yurosek & Sons*, 225 NLRB 148, 149–150 (1976) (serving on in-plant organizing committee and as observers), enf’d. 597 F.2d 661 (9th Cir. 1979), cert. denied 444 U.S. 839 (1979). See also *Catherine’s, Inc.*, 316 NLRB 186, 189 (1995) (“where employee members of the in-house organizing committee make prejudicial or inflammatory remarks against the Employer … [such statements] do not constitute a basis for setting aside the election, where there is no evidence that the Union authorized or condoned these offensive sentiments.”). I find, as a result, that United Scrap failed to satisfy its burden of proof on the agency issue (i.e., it showed that he was the Union’s observer, attended its meetings and invited coworkers to meetings, which is insufficient to establish agency, and wholly failed to show that the Union ratified his alleged “jefe” comments). However, even though Acosta is not an agent, it is still necessary to examine whether his third-party conduct regarding Larios was objectionable.

**b. Findings**

Acosta’s third-party conduct regarding Larios was not objectionable (i.e., his threats). Objection 2 is, accordingly, overruled. Although third-party conduct may present grounds for setting aside an election, the Board “accords less weight to such conduct than to conduct of the parties.” *Orleans Mfg. Co.*, 120 NLRB 630, 633 (1958). Third-party conduct will be grounds for setting an election aside, only when “the conduct was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.” *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984). In gauging third-party threats, the Board examines these factors:

1. the cumulative effect of the threats; 2. whether the threats were directed at all employees in the bargaining unit; 3. whether the persons making the threats are capable of carrying out the threats; 4. the degree to which the threats were disseminated; and 5. whether the threats were made in close proximity to the date of the election.

*Nor-Cal Ready Mix, Inc.*, 327 NLRB 1091 (1999). However, “the subjective reactions of employees are irrelevant to the question of whether there was, in fact, objectionable conduct.”

---

28 As noted, even assuming arguendo that Acosta made these comments about his elevated Union status, the record fails to demonstrate that the Union was even remotely aware that he was allegedly holding himself out as the Union “jefe” or telling others that he was the future Union representative or steward.
Emerson Electric Co., 247 NLRB 1365, 1370 (1980), enf’d. 649 F.2d 589 (8th Cir. 1981). The Board assesses “whether it is likely that the employees acted in fear of [a third party’s] capability of carrying out the threat.” Westwood Horizons Hotel, 270 NLRB 802, 803 (1984).

In applying the Board’s third-party balancing test to objection 2, I find that Acosta’s actions were not “so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.” Regarding factor one (i.e., the cumulative impact of his physical threat to Larios), there is no evidence that Acosta’s threat had any cumulative impact whatsoever. It is difficult to even decipher whether his threat to Larios was based upon Union support or general animosity. Larios also marginalized the threat, when he told Acosta that he was always threatening people. There is also no evidence that other employees took Acosta’s comments seriously or that his comments impacted their thinking. To the contrary, it’s not even clear whether anyone other than Salinas heard the exchange. Moreover, if Acosta’s physical threat to Larios were deemed serious, it would have been reported to management and the police; the absence of such reports undercuts the threat’s cumulative impact. Factor one, as a result, strongly gravitates against finding objectionable conduct. Regarding factor two (i.e., whether the threat was directed at the entire Unit), this factor detracts from finding objectionable conduct, inasmuch as the threat was solely directed at Larios. Regarding factor three (i.e., Acosta’s ability to carry out the threat), this factor detracts from finding objectionable conduct, inasmuch as there was no evidence that Acosta was empowered to harm Larios at a later date. It is unlikely that a rational employee would have taken this matter seriously. Regarding factor four (i.e., dissemination), there is, again, no evidence that Acosta’s empty threat was disseminated to anyone beyond Larios and Salinas. Regarding factor 5 (i.e., proximity to the election), the threat was made the day before the election. However, this factor, in isolation, is grossly insufficient to “create a general atmosphere of fear and reprisal rendering a free election impossible.” Westwood Horizons Hotel, 270 NLRB 802, 803 (1984).

C. Objection 7

This objection provides, in relevant part, that:

[T]he Union … coerced eligible voters by attempting to stop employees in their vehicles as they entered the facility, and if employees did not stop, the Union’s agents openly took photographs of employee vehicles as the entered the facility. 30

1. United Scrap’s Witnesses

Haas testified that, on October 16, he saw 5 men with Union jackets and insignia flag down arriving employees on the private road that led to the plant. He said that the group recorded workers, who failed to stop. He said that he alerted Security Guard Charles Nelson,

30 See Randell Warehouse of Arizona, Inc., 347 NLRB 591, 598 (2006) (photographing employees during a union campaign constitutes objectionable conduct unless the reason is explained to the employees or is self-evident).
who told the organizers to leave.  

2. Union’s Witnesses

Union Business Agent Plaza recalled visiting the plant with other organizers and distributing Union t-shirts and materials to arriving workers. He denied that the Union photographed anyone. Union organizer Raymond Richardson corroborated his testimony.

3. Analysis

Objection 7 is overruled. Given that Haas said that the Union recorded employees who refused organizing materials, and Plaza and Richardson denied such activity, a credibility resolution must be made. For several reasons, I credit Plaza and Richardson. First, regarding demeanor, Plaza and Richardson were strong and believable witnesses. Second, I find it highly improbable that the Union, during the early stages of its campaign, would have risked irreparably destroying the good will that it was trying to create by recording employees, who were either unwilling or too fearful to talk at that point. It is doubtful that the Union decided that the best way to attract skittish workers was to record and disenfranchise them. Third, if recording actually occurred, I find that it is highly likely that United Scrap would have made this an important electioneering point and filed a related ULP, which never occurred. Finally, the purest evidence of what occurred is contained in Haas’ recorded statement, which only described 2 people distributing materials and omits talk of videotaping. I find it plausible that, if videotaping actually occurred, Haas would have cited it. (GC Exh. 3). On these bases, each of which would suffice in isolation, Plaza and Richardson have been credited; I, thus, find that arriving employees were not recorded by the Union.

Conclusions of Law

1. United Scrap is an employer engaged in commerce within the meaning of §2(2), (6), and (7) of the Act.

2. The Union is a §2(5) labor organization and the designated exclusive collective-bargaining representative of United Scrap’s employees at its Philadelphia, Pennsylvania plant in the following appropriate collective-bargaining unit:

   Included: All full time and regular part time unskilled laborers, press operators, shear operators, welders, burners and hoist operators.

   Excluded: All other employees, supervisors and guards as defined by the Act.

3. United Scrap violated §8(a)(1) by:

   a. Telling employees to not accept Union authorization cards, t-shirts or

   31 Nelson corroborated that he directed the organizers to leave.
other organizing materials.

b. Confiscating Union t-shirts from employees’ vehicles.

c. Allowing employees to hold an anti-Union meeting at the plant during working time, while simultaneously preventing them from engaging in pro-Union activities.

d. Soliciting grievances from employees and making implied promises to remedy their grievances in order to undermine their Union support.

e. Interrogating employees about their Union and other protected activities.

f. Assisting and encouraging the circulation of a petition to oust the Union.

4. United Scrap violated §8(a)(5) by unilaterally changing the Unit’s scheduled hours and days of work.

5. These unfair labor practices affect commerce within the meaning of §2(6) and (7).

6. United Scrap’s election objections in Case 04-RC-267642 are overruled.

Remedy

The appropriate remedy for the violations found herein is an order requiring United Scrap to cease and desist from its unlawful conduct and to take certain affirmative action. Having found that it unlawfully unilaterally changed Unit schedules, it is directed to reinstitute the terms and conditions of employment that existed before its unlawful changes, upon request from the Union. It shall make employees whole for any loss of earnings and other benefits resulting from its unlawful unilateral changes as prescribed in Ogle Protection Service, 183 NLRB 682 (1970), enf’d. 444 F.2d 502 (6th Cir. 1971), plus interest at the rate prescribed in New Horizons, 283 NLRB 1173 (1987), compounded daily as prescribed in Kentucky River Medical Center, 356 NLRB 6 (2010). In accordance with AdvoServ of New Jersey, Inc., 363 NLRB 1324 (2016), it shall compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 4, within 21 days of the date the amount of backpay is fixed, either by agreement or Board Order, a report allocating the backpay award to the appropriate calendar years for each employee.

Regarding the GC’s notice reading request, the Board grants such a remedy in these 2 situations: (1) where the ULPs are so pervasive and egregious that a notice reading is necessary to dispel the impact of such conduct;32 and (2) when the evidence establishes that a

significant number of the employees cannot read a notice. Although I do not find that the ULPs herein are so pervasive and egregious that a notice reading is warranted on this basis, I do find that a large portion of United Scrap’s mostly Hispanic workforce can only speak Spanish (i.e., cannot read in Spanish or English) and that a notice reading in Spanish is warranted on this basis. As a result, in order to ensure that such employees understand the notice, United Scrap shall hold a meeting or meetings during worktime at its Philadelphia, Pennsylvania facility, scheduled to ensure the widest possible attendance of employees, at which time the notice is to be read to employees in Spanish “by a high-ranking manager in the presence of a Board agent and a union representative if the Region or the Union so desires, or, at the Respondent's option, by a Board agent in the presence of management and, if the Union so desires, a union representative.” Johnston Fire Services, LLC, 371 NLRB No. 56, slip op. at 8 (2021). Finally, United Scrap shall post the attached notice in English and Spanish in accordance with J. Picini Flooring, 356 NLRB 11 (2010).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended

ORDER

United Scrap Metal PA, LLC, Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

   a. Telling employees to not accept Union authorization cards, t-shirts or other organizing materials.

   b. Confiscating Union t-shirts from employees’ vehicles.

   c. Permitting employees to hold an anti-Union meeting during working time, while simultaneously preventing workers from engaging in pro-Union activities.

   d. Soliciting grievances from employees and making implied promises to remedy their grievances in order to undermine their Union support.

   e. Interrogating employees about their Union activities.

   f. Assisting and encouraging the circulation of an anti-Union petition.

34 A notice-reading remedy is neither necessary nor appropriate based strictly upon the ULPs at issue herein because the Board’s traditional remedies will sufficiently advise employees about the unlawful conduct. See, e.g., Queen of the Valley Medical Ctr., 368 NLRB No. 116, slip op. at 4 (2019).
35 If no exceptions are filed as provided by §102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.
g. Changing terms and condition of employment of Unit employees, including their scheduled hours and days of work, without first notifying the Union and giving it an opportunity to bargain.

h. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by §7 of the Act.

2. Take the following affirmative action necessary to effectuate the Act’s policies

a. Before implementing any changes in wages, hours, or other terms and conditions of employment, notify and, upon request, bargain with the Union as the designated exclusive collective-bargaining representative of its employees at its Philadelphia, Pennsylvania plant in the following appropriate collective-bargaining unit:

**Included:** All full time and regular part time unskilled laborers, press operators, shear operators, welders, burners and hoist operators.

**Excluded:** All other employees, supervisors and guards as defined by the Act.

b. Upon request by the Union, and to the extent it has not already done so, rescind the unilateral changes in the hours and days of work of the Unit made on November 20, 2020.

c. Make affected employees whole for any loss of earnings and other benefits suffered as a result of the unilateral change, in the manner set forth in the remedy section.

d. Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 4, within 21 days of the date the amount of backpay is fixed, either by agreement or Board Order, a report allocating the backpay awards to the appropriate calendar year for each employee.

e. Preserve and, within 14 days of request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

f. Within 14 days after service by the Region, post at its Philadelphia, Pennsylvania facility the attached notice marked “Appendix” in English and Spanish.\textsuperscript{36} Copies

\textsuperscript{36} If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”
of the notice, on forms provided by the Regional Director for Region 4, after being signed by
the Respondent’s authorized representative, shall be posted by the Respondent and maintained
for 60 consecutive days in conspicuous places, including all places where notices to
employees are customarily posted. In addition to the physical posting of paper notices, notices
shall be distributed electronically, such as by email, posting on an intranet or an internet site,
and/or other electronic means, if the Respondent customarily communicates with its
employees by such means. Reasonable steps shall be taken by the Respondent to ensure that
the notices are not altered, defaced, or covered by any other material. If the Respondent has
gone out of business or closed the facility involved in these proceedings, the Respondent shall
duplicate and mail, at its own expense, a copy of the notice to all current employees and
former employees employed by the Respondent at any time since October 16, 2020.

g. Hold a meeting or meetings during working hours at its Philadelphia,
Pennsylvania plant, scheduled to ensure the widest possible attendance of employees, at
which the attached notice marked “Appendix” will be read to employees in Spanish by a high-
ranking management official of the Respondent in the presence of a Board Agent and an agent
of the Union if the Region or the Union so desires, or, at the Respondent's option, by a Board
agent in the presence of a high-ranking management official of the Respondent and, if the
Union so desires, the presence of an agent of the Union.

h. Within 21 days after service by the Region, file with the Regional
Director for Region 4 a sworn certification of a responsible official on a form provided by the
Region attesting to the steps the Respondent has taken to comply.

It is further recommended that the objections filed by Respondent in Case 04-RC-
267642 are overruled and that a Certification of Representative should issue.

Dated Washington, D.C. February 16, 2022

Robert A. Ringler
Administrative Law Judge
APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities

WE WILL NOT tell you not to accept Union authorization cards, t-shirts or other organizing materials.

WE WILL NOT take Union t-shirts from your vehicles.

WE WILL NOT allow you to hold an anti-Union meeting at the plant during working time, while also stopping you from engaging in pro-Union activities.

WE WILL NOT solicit your grievances and make implied promises to remedy your grievances in order to undermine your support for the Union.

WE WILL NOT question you about your Union and other protected activities.

WE WILL NOT help and encourage you to circulate a petition to oust the Union.

WE WILL NOT change your terms and condition of employment, including your scheduled hours and days of work, without first notifying the Union and giving it an opportunity to bargain over these issues.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, before making any changes in the wages, hours or other terms and conditions of employment of our bargaining unit employees, notify and, upon request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate collective-bargaining unit:
Included: All full time and regular part time unskilled laborers, press operators, shear operators, welders, burners and hoist operators.

Excluded: All other employees, supervisors and guards as defined by the Act.

We will, upon request by the Union, and to the extent we have not already done so, rescind the changes in scheduled hours and days of work for our bargaining unit employees that were unilaterally implemented on November 20, 2020, and restore the scheduled hours and days of work that existed prior to the change until such time as we have bargaining with the Union to an agreement or impasse.

We will make employees whole for any loss of earnings and other benefits suffered as the result of our unlawful unilateral change to your scheduled hours and days of work, plus interest.

We will compensate employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and we will file with the Regional Director for Region 4, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year for each employee.

UNITED SCRAP METAL, PA, LLC

(Employer)

Dated ____________________ By ____________________________________________

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board’s Regional Office set forth below. You may also obtain information from the Board’s website: www.nlrb.gov.

Wanamaker Building, 100 East Penn Square, Suite 403, Philadelphia, PA 19107
(215) 597-7601, Hours: 8:30 a.m. to 5:00 p.m.

The Administrative Law Judge’s decision can be found at www.nlrb.gov/case/04-CA-268183 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.
THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE’S COMPLIANCE OFFICER (215) 597-5354.